7-5-1990

No. 90-7099 Opposition to Motion for Summary Affirmance

United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANN B. HOPKINS,	)	
	)	
Appellee,	)	No. 90-7099
	)	
v.	)	
	)	
PRICE WATERHOUSE,	)	
	)	
Appellant.	)	
	)	

OPPOSITION TO MOTION FOR
SUMMARY AFFIRMANCE

PRELIMINARY STATEMENT

Plaintiff filed a motion for summary affirmance in conjunction with her opposition to Price Waterhouse's emergency motion for stay of the District Court's May 25, 1990 Title VII judgment in this case. In that motion, plaintiff argued that the merits of this appeal are so "clear" that this Court should affirm the judgment of the District Court without the benefit of briefing, oral argument and deliberation. But plaintiff's arguments against full judicial scrutiny of the difficult legal and factual issues presented by this case do not begin to meet the Court's standard for summary affirmance.

The District Court imposed liability on Price Waterhouse despite overwhelming evidence that plaintiff's partnership candidacy was deferred because she was abusive to subordinates, not because of her sex. The District Court's

remedy is unprecedented in Title VII jurisprudence: to compel Price Waterhouse to make plaintiff a partner in the Price Waterhouse firm. The partnership was ordered in the face of an express finding that plaintiff's own "unreasonable intentional conduct . . . removed any possibility" that she would be made partner. The District Court determined that it was bound by the law of the case to a vacated opinion by this Court that was, in turn, based on an erroneous reading of the District Court's earlier findings. These and other aspects of this case raise difficult, substantial, and manifestly important questions of first impression. Moreover, this Court's grant of Price Waterhouse's request for a stay of the judgment and its order that the appeal be expedited effectively render moot any theoretical or practical justifications for invocation of the extraordinary and rare summary disposition procedure.[1/] Plaintiff's request for summary affirmance must therefore be denied.

PROCEDURAL HISTORY

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, et seq. Plaintiff Ann B. Hopkins contends that defendant's 1983 decision deferring for

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1/ See June 29, 1990 Order. Appellant's Brief and Appendix are due July 18, 1990; appellee's brief is due August 8, 1990; appellant's reply is due August 15, 1990; and oral argument is scheduled for September 7, 1990. Id.

one year her candidacy for admission to the Price Waterhouse partnership was based upon considerations of sex. She has sought an order requiring her admission to the partnership, back pay and attorney's fees.

In its initial decision in 1985, after a nonjury trial, Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1114 (D.D.C. 1985), the District Court found that plaintiff's "conduct provided ample justification for the complaints that formed the basis [for defendant's] decision." There were legitimate, nonpretextual bases for deferring her partnership candidacy. Plaintiff was "assertive, overly critical of others, impatient with her staff," id. at 1114, "overly aggressive, unduly harsh, difficult to work with" and generally abusive to subordinates. Id. at 1113. These views were shared by Price Waterhouse partners and staff, and plaintiff admitted their validity. Id. The District Court found that Price Waterhouse "had every reason and legal right to come down hard on abrasive conduct in men or women seeking partnership." Id. at 1120.

Nevertheless, the court found that Price Waterhouse had permitted an unquantified level of "unconscious" sexual stereotyping to play an "undefined role" in its decisionmaking process. Id. at 1118. The District Court concluded that because Price Waterhouse had not proven by "clear and convincing evidence that the decision [to defer plaintiff's candidacy for one year] would have been the same absent

discrimination," id. at 1120, Price Waterhouse had violated Title VII.[2/]

In August 1987, this Court affirmed the District Court's decision as to liability "[b]ecause Price Waterhouse could not demonstrate by clear and convincing evidence" that it would have made the same decision deferring plaintiff's partnership candidacy irrespective of her gender. Hopkins v. Price Waterhouse, 825 F.2d 458, 472 (D.C. Cir. 1987).[3/]

On May 1, 1989, the Supreme Court of the United States reversed the decision of this Court. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). The Court held that "an employer shall not be liable if it can prove [by a preponderance of the evidence] that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." Id. at 1786. The Supreme Court reversed the judgment of liability against Price

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2/ When plaintiff came up for partnership consideration the following year, she was not reproposed. The District Court ruled that Price Waterhouse's decision not to repropose plaintiff for partner the subsequent year was nondiscriminatory. Id. at 1115. That finding was not appealed. As will be discussed in more detail, infra, the District Court reaffirmed on remand that the decision not to repropose plaintiff for partnership was not discriminatory and, indeed, found that it was caused by plaintiff's own unreasonable conduct.

3/ Judge Williams dissented from the panel's holding affirming liability, observing that "the record here provided no causal connection between Hopkins' fate and [sexual] stereotyping . . . ." 825 F.2d at 474 (Williams, J., dissenting).

Waterhouse and remanded the case for further proceedings because this Court and the District Court had "erred by deciding that the defendant must make this proof by clear and convincing evidence . . . ." Id. at 1795. In an August 1, 1989 order, this Court vacated its 1987 mandate and remanded to the District Court for further proceedings.

Upon remand and after additional briefing and argument, the District Court ruled that Price Waterhouse "ha[d] not met its burden" under the preponderance of the evidence standard and therefore was liable under Title VII. Finding of Fact and Conclusions of Law on Remand ("Findings on Remand"), at 11 (May 14, 1990). In determining the appropriate remedy, the court below concluded that it had statutory authority under Title VII to order Price Waterhouse to admit plaintiff to the professional partnership and that such an order was an appropriate exercise of its discretion in this case. Id. at 16, 19. The District Court also ruled that, although plaintiff had failed to mitigate damages, she was entitled to back pay for the period July 1, 1984 through June 30, 1990.

The District Court entered its final order and judgment on May 25, 1990 requiring Price Waterhouse, inter alia, to admit plaintiff into the partnership on July 1, 1990 and to pay plaintiff back pay in the amount of $371,175 and reasonable attorney's fees. May 25, 1990 Remedial Order. On June 21, 1990, Price Waterhouse timely filed its Notice of Appeal and Motion for Stay in the District Court. The District

Court denied Price Waterhouse's request for a stay on June 25, 1990, "except as to attorney fees."

On June 29, 1990, this Court granted Price Waterhouse's request for a stay of the partnership order and back pay award and expedited the appeal.

ARGUMENT

A. Facts and Findings Below and the Standards Applicable to Motions for Summary Affirmance.

"Price Waterhouse is a partnership that specializes in providing auditing, tax and management consulting services primarily to private corporations and government agencies . . . . Its partners are certified public accountants and other specialists." 618 F. Supp. at 1111. Notwithstanding its size, "Price Waterhouse has consistently sought to maintain the traditional characteristics of a professional partnership both in its management and partnership selection practices." Id.

Price Waterhouse's decision in 1983 to "hold" or defer plaintiff's partnership candidacy was a response by firm partners to plaintiff's serious deficiencies in interpersonal relationships, particularly in dealing with subordinates. The District Court found that interpersonal skills and respect and decency toward staff and subordinates were "properly an important part of Price Waterhouse's written partnership evaluation criteria." Id. at 1114. The inability to get along

with staff or peers was "a legitimate, nondiscriminatory reason for refusing to admit a candidate to partnership." Id.

Plaintiff received more "no" votes on her candidacy than 85 of the 88 candidates in 1983. Id. at 1116. Nearly two-thirds of the partners that commented on plaintiff on the basis of direct experience with her had criticisms of her manner, style and relationships with subordinates. See Def. Ex. 27. Price Waterhouse candidates, male and female, are "regularly held because of concerns about their interpersonal skills . . . ." 618 F. Supp. at 1116. The partnership "takes any evaluations recommending denial of partnership or a negative reaction on this basis very seriously . . . The firm's practice of giving 'no' votes great weight treated male and female candidates in the same way." Id.

The "hold" decision was not a final rejection. It gave plaintiff a legitimate and fair opportunity to become a Price Waterhouse partner:

> There is little reason to believe the hold was a cynical gesture; 16 of the 19 candidates placed on hold with Ms. Hopkins in 1983 made partner in 1984, and in her case the decision to hold her over appears to have been a considered business decision that her talent justified giving her candidacy another look. It is clear from the record that she was given a genuine chance to demonstrate her ability to overcome her differences in interpersonal relationships.

Findings on Remand, at 24-25.

But plaintiff sabatoged her own "genuine chance" for a Price Waterhouse partnership. The District Court twice found that defendant's decision not to repropose plaintiff for partner the following year was not discriminatory. 618 F. Supp. at 1115. In fact, the District Court found that plaintiff's "unreasonable intentional conduct" (Findings on Remand, at 23), which consisted of misleading statements and misrepresentations, "removed any possibility that she would be accepted as a partner" after the initial "hold" decision. Id. at 25.

The District Court found that certain comments about plaintiff that antedated the "hold" decision may have been "tainted by unarticulated, unconscious assumptions related to sex." 618 F. Supp. at 1118. Thus, although "it is impossible to label any particular negative reaction as being motivated by intentional sex stereotyping," id., the District Court held that those impermissible ingredients "combined to produce discrimination" in this case. Id. at 1120.

On remand, the District Court was asked to re-evaluate the evidence under the lower preponderance of the evidence standard. The court found unpersuasive defendant's arguments that the nature, depth, diversity and intensity of the criticism leveled at plaintiff by partners and her peers and acknowledged by herself, and the evidence accepted by the court in the first trial that males with similar personality problems had also been "held" established by a preponderance of the

evidence that Price Waterhouse would have deferred the partnership of plaintiff, or any candidate with a similar record, regardless of sex. Thus, the court not only required Price Waterhouse to prove that it would have rejected plaintiff regardless of her sex, but allowed the speculation of plaintiff's expert to disqualify as potentially tainted every criticism of plaintiff's "conduct" in the first trial that the court had earlier found provided "ample justification" for the decision. In short, even though plaintiff was unable even to identify a single comment as tainted, her expert's view that some of the comments might have been tainted was allowed by the court below to obliterate every legitimate criticism of plaintiff's behavior. See Findings on Remand, at 6-11.

The District Court ordered Price Waterhouse to make plaintiff a partner in the firm effective July 1, 1990. During the trial, the court below acknowledged that ordering a partnership in a professional firm was an unprecedented Title VII remedy:

> I now am confronted with whether or not I'm going to exercise my discretion as a judge to be the first federal judge ever to put somebody into a partnership and I want to tell you that that's a difficult decision.

1990 Tr. at 250 (emphasis added). Indeed, no federal court has ever decreed a professional partnership as a Title VII remedy.

The circumstances of this case make it manifestly ill-suited for summary disposition. The extraordinary summary

procedure is generally invoked only in cases in which no issue of disputed fact exists,[4/] where an "uncomplicated legal issue [is] to be decided in an area where the case law is well developed,"[5/] or the appeal involves a nonfinal judgment in an ongoing proceeding.[6/] The "exacting standards"[7/] governing summary disposition of appeals in this Circuit are well settled. "Because of the serious consequences that flow from granting summary disposition, the court imposes on a party who requests summary affirmance . . . a 'heavy burden.'" United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984) (per curiam) (quoting United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1969) (per curiam)). The movant must demonstrate that the merits "are so clear" that "plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision" and are therefore unnecessary. Sills v. Bureau of Prisons, 761 F.2d

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4/ See, e.g., United States v. Glover, 731 F.2d 41, 45 (D.C. Cir. 1984) (per curiam); Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987) (per curiam) (summarily affirming order granting summary judgment); Walker v. Washington, 627 F.2d 541 (D.C. Cir. 1980) (per curiam) (summarily affirming order granting summary judgment).

5/ Glover, 731 F.2d at 45; see, e.g., Dornan v. United States Secretary of Defense, 851 F.2d 450, 451 (D.C. Cir. 1988) (per curiam) (summarily affirming and applying "clear[] law of this circuit").

6/ See, e.g., Ambach v. Bell, 686 F.2d 974 (D.C. Cir. 1982) (per curiam) (review of preliminary injunction).

7/ Federal Election Comm'n v. Rose, 806 F.2d 1081, 1092 (D.C. Cir. 1986).

792, 793 (D.C. Cir. 1985); Glover, 731 F.2d at 44; Parker v. Lewis, 670 F.2d 249, 250 (D.C. Cir. 1981) (per curiam) (correctness of district court's decision must be "totally free from doubt" to permit summary affirmance). In addition, a party seeking summary affirmance must convince the Court that "the need for speedy resolution of [the] appeal," Glover, 731 F.2d at 45, and the unique and special "circumstances of the case," Ambach v. Bell, 686 F.2d 974, 979 (D.C. Cir. 1982), justify preempting the ordinary appellate process. None of these factors exist in this case.

B. This Case Presents Difficult, Serious and Novel Questions for Appeal.

As Price Waterhouse demonstrated in its Emergency Motion for Stay, at 10-16, and its Reply, at 3-6, the District Court's judgment raises substantial and important issues relating to the interpretation and application of Title VII.

1. The District Court's Liability Finding is Clearly Erroneous. The District Court's liability finding on remand creates factual and legal issues that are complex and unique. Although the court below on remand purported to apply the "less exacting" preponderance of the evidence standard of proof, it characterized Price Waterhouse's burden as "a difficult task of proof." Findings on Remand, at 11. Notwithstanding that the District Court had earlier found that "it is impossible to label any particular negative reaction [to plaintiff's

interpersonal skills] as being motivated by intentional sex stereotyping," 618 F. Supp. at 1118, the District Court concluded on remand that Price Waterhouse was required "to separate out those comments tainted by sexism from those free of sexism," Findings on Remand, at 10, and was required somehow to "identify each stereotyped negative comment." Id. at 9. The District Court allowed speculation to trump hard evidence and then faulted Price Waterhouse for failing to disprove that which plaintiff had found it impossible to prove. The Supreme Court's mandate cannot possibly be construed to have imposed such a "difficult" and "impossible" task upon Price Waterhouse on remand.

Moreover, although the record contains substantial evidence that Price Waterhouse often "held" male candidates who manifested interpersonal skills problems similar to plaintiff's, the District Court did not mention, and does not even appear to have considered, that proof in its analysis on remand, even though this is seemingly precisely the kind of "objective evidence" that the Supreme Court contemplated should be considered in determining whether the firm had met its burden on the "same decision" issue. See 109 S. Ct. at 1791; compare NLRB v. Transportation Management Corp., 462 U.S. 393, 396-97, 404 (1983) (when the "transgressions . . . that purportedly would have prompted [the] discharge were commonplace, and no transgressor had ever before received any kind of discipline," employer failed to meet burden of showing

discharge would have occurred absent antiunion animus). In short, the District Court's interpretation of the Supreme Court's mandate and its application of the preponderance of the evidence standard in the sex stereotyping context present perplexing questions in a new area of Title VII jurisprudence. These questions warrant careful consideration by this Court.[8/]

2. Partnership As a Title VII Remedy. The question whether federal courts have authority under Title VII to compel individuals to form a partnership is an issue of first impression. The District Court itself acknowledged that "whether the Court should force Price Waterhouse to make Ms. Hopkins a partner presents a difficult and unresolved issue." Findings on Remand, at 16.

The District Court purported to rely upon the Supreme Court's decision in Hishon v. King & Spalding, 467 U.S. 69 (1984), for authority to order partnership in this case. However, the "narrow holding" (id. at 78 n.10) in Hishon that "in appropriate circumstances partnership consideration may qualify as a term, condition, or privilege of a person's employment" (emphasis added) for purposes of Title VII does not

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8/ This Court has not hesitated to overturn district court rulings in Title VII cases where, as here, the district court has seriously misinterpreted the record. Compare Palmer v. Baker, 52 Fair Empl. Prac. Cases (BNA) 1458, 1461 (D.C. Cir. May 11, 1990) (reversing district court's ruling that defendant had not violated Title VII because the "district court's conclusion . . . was based on a clearly erroneous interpretation" of the evidence).

resolve the question of the power of courts under Title VII to decide who shall be partners in a professional relationship.[9/] In a concurring opinion in Hishon, Justice Powell observed that undue "impediments to the exercise of one's right to choose one's associates can violate the right of association guaranteed by the First and Fourteenth Amendments,"[10/] id. at 80 n.4, and emphasized "that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply." Id. at 79 (emphasis added). The District Court's order would not only compel the creation of a "relationship among partners," but would also apparently

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9/ The plaintiff in Hishon did not seek admission as a partner. Therefore, the issue whether that remedy is statutorily or constitutionally authorized was not before the Court. See 467 U.S. at 72 (plaintiff "sought . . . compensatory damages 'in lieu of reinstatement and promotion to partnership.' This, of course, negates any claim for specific performance of the contract alleged."); id. at 72-73 n.2; id. at 80 n.4 (Powell, J., concurring).

10/ The Court in Hishon rejected the argument that the First Amendment protected the right to engage in "'invidious private discrimination.'" 467 U.S. at 78 (citation). However, Price Waterhouse has made no such First Amendment claim. It contends only that in light of the collegial, private nature of the Price Waterhouse partnership, the First Amendment requires that the least instrusive remedial alternative available be chosen. Compare Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 & n. 11 (1986) ("the fact that [associational rights] are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement").

afford to the District Court permanent and continuing jurisdiction over that relationship.[11/] See May 25, 1990 Remedial Order, at 2.

Title VII expressly applies only to "employment" arrangements and makes "reinstatement or hiring of employees" an available remedy. 42 U.S.C. § 2000e-5(g) (emphasis added). There is nothing to suggest that Title VII was intended to empower courts to transform simple employment relationships into partnerships, or to order individuals to become partners once their employment relationship has been terminated.[12/]

11/ The courts have uniformly declined to extend federal anti-discrimination statutes, including Title VII, to members of professional partnerships. See, e.g., Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); see also Wheeler v. Main Hurdman, 825 F.2d 257, 263 (10th Cir.), cert. denied, 484 U.S. 986 (1987).

12/ The courts in equity historically have been reluctant to compel the existence and continuation of personal relationships. See, e.g., Karrick v. Hannaman, 168 U.S. 328, 335 (1897) (courts "will seldom, if ever, specifically compel . . . performance of [a partnership] contract, the contract of partnership being of an essentially personal character") (emphasis added); Marek v. McHardy, 234 La. 841, 101 So. 2d 689, 693 (1958) ("Manifestly, in a case like this involving personal services coupled with a promise of the obligees to make the plaintiff their business partner, the court would not order the exceptional relief of specific performance."); compare EEOC v. Kallir Phillips Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976) (denying reinstatement to executive position because it "required a close working relationship between plaintiff and top executives of defendant" and "frequent personal contact with defendant's clients"), aff'd without opinion, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977); Hyland v. Kenner Products Co., 13 Fair Empl. Prac. Case (BNA) 1309, 1321 (S.D. Ohio 1976) (rejecting reinstatement of executive because "a person in an executive or management position must have complete confidence of others in management").

See Wheeler v. Main Hurdman, 825 F.2d 257, 275-76 (10th Cir.), cert. denied, 484 U.S. 986 (1987). ("The requirement that [Title VII and similar federal statutes] cover only employment situations suggests that Congress perceived a need to limit the application of these statutes."). The District Court's decision wholly fails to "giv[e] effect to the meaning and placement of the words chosen by Congress," Hughey v. United States, No. 89-5691, slip op., at 6 (U.S. May 21, 1990), and presents serious questions of statutory interpretation.

Contrary to plaintiff's assertion, Motion for Summ. Aff., at 14-15, the 1987 decision of this Court did not "indicat[e] . . . that it viewed an offer of partnership as the appropriate prospective relief" in this case. Plaintiff's assertion in that regard is most misleading. The issue of partnership admission was not tried, briefed, or argued in the District Court in 1985 and therefore was not a question presented for review in this Court or in the Supreme Court.[13/] Thus, this Court has not had the opportunity to deliberate and consider the merits of the indisputably important question whether Title VII's equal employment

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13/ This Court correctly assumed in its 1987 opinion that the District Court in the 1985 trial did not evaluate whether partnership admission was an authorized or appropriate Title VII remedy due to its holding that plaintiff voluntarily resigned from the firm and was not "constructively discharged." See 825 F.2d at 472-73. This Court reversed on the constructive discharge issue and remanded the case to the District Court for determination of the partnership admission question in the first instance. Id. at 473.

provisions empower courts to create nonemployment relationships such as partnerships, and, indeed, that question has not been resolved by any other federal court.[14/] It is an important question of federal law that should be fully briefed and argued.

3. Partnership As a Remedy in This Case. Price Waterhouse also contends that the District Court committed reversible error when it ordered Price Waterhouse to admit plaintiff as a partner under the peculiar facts of this case. The court issued a partnership decree based upon the "ill-defined theory of 'sex stereotyping,'" Findings on Remand at 32, despite evidence from most of the partners who evaluated plaintiff that she did not pass a legitimate Price Waterhouse criterion for partnership, that she was given a fair and unbiased opportunity to correct her problems, that her own "unreasonable intentional" conduct deprived her of any "possibility" of making partner and that this process and these

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14/ Other cases relied upon by plaintiff, Pl. Motion for Summ. Aff., at 11-14, are simply inapposite. Lander v. Lujan, 888 F.2d 153 (D.C. Cir. 1989), involved the reinstatement of a federal civil service employee to "essentially the same job" as he had previously held (id. at 158), a remedy that falls squarely within the jurisdictional strictures of Title VII. Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1990), cert. denied, 58 U.S.L.W. 3796 (June 19, 1990), affirmed an order compelling promotion of an "assistant professor" to "associate professor" with tenure. Such an order creates no more than a long-term employment relationship. In University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990), the Supreme Court simply suggested in dicta that partnerships are not entitled to a special First Amendment privilege to withhold partnership candidate review materials during discovery, a proposition that is not at issue in this case.

events, which were the actual cause of her not making partner, were not discriminatory. Id. at 23-25. Ordering a partnership under such circumstances cannot reasonably be characterized as an appropriate exercise of equitable discretion under Title VII, even if the statute authorizes such relief.

4. The District Court Erroneously Applied the Law of the Case Doctrine. The District Court ordered partnership based on the assumption that it was bound by the law of the case doctrine to a conclusion expressed in the previous Court of Appeals' decision with respect to whether plaintiff had been constructively discharged. Id. at 14. But that remedial decision was predicated upon a liability determination that was overturned by the Supreme Court. It was contained in an opinion by a panel of this Court that was vacated when this case was remanded to the District Court. And it was squarely and unavoidably tied to the panel's erroneous reading of the District Court's factual findings. The District Court has now made it clear beyond any room for argument that the damage caused by the conduct found to be discriminatory consisted of deferral of plaintiff's partnership candidacy for one year, treatment likewise received by eighteen other candidates. The subsequent decision not to repropose plaintiff for partner, which made it impossible for her to become a partner and which was the basis of her decision to leave the firm, was the direct and inescapable consequence of unreasonable and intentional

acts by plaintiff and was not tainted in any way by discrimination. This Court, in its previous decision, surely did not intend to find a constructive discharge under these circumstances. But, in any event, the opinion that addressed that subject has been vacated, is not the law of the case, and cannot have compelled the District Court to adopt a conclusion with which it did not agree.

C. The Expedited Briefing Schedule Makes Summary Disposition Wholly Unnecessary.

This Court's June 29, 1990 order establishing an expedited briefing schedule conclusively resolves any claim that summary disposition is necessary to effect "a speedy resolution" of the appeal, see Glover, 731 F.2d at 45, and effectively moots plaintiff's request for summary treatment of the merits. Indeed, Price Waterhouse's opening brief is due less than two weeks after the filing of this Opposition and a complete appellate record will be available to the Court in approximately 90 days. See supra note 1. Under such circumstances, invocation of summary procedures would be duplicative and unnecessary.

CONCLUSION

Plaintiff's assertion that the foregoing issues are "so clear" as to justify summary disposition is inexplicable and completely unfounded. Indeed, this Court's grant of a stay of the judgment demonstrates that the appeal presents substantial and important questions and that there is a reasonable likelihood that Price Waterhouse will succeed on the merits.[15/] It would therefore be inappropriate and unjust to resolve this case without engaging in the "collegial deliberative process" on appeal and in the absence of complete briefing of the merits and oral argument pursuant to the expedited briefing schedule. See Glover, 731 F.2d at 52 (Mikva, J., dissenting). The motion for summary affirmance must be denied.

Dated: July 5, 1990

Respectfully submitted,

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15/ To justify a stay Price Waterhouse was required to demonstrate, inter alia, a "probability of success on the merits." Washington Area Metropolitan Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). The motions panel concluded that Price Waterhouse had met that standard. See June 29, 1990 Order.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposition to Motion for Summary Affirmance to be served by hand delivery this 5th day of July 1990, upon James H. Heller, Esq., Kator, Scott & Heller, 1275 K Street, N.W., Suite 950, Washington, D.C. 20006.

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